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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 630

CENTRAL TRANSPORTATION COMPANY,

vs.

Z. D. ATKINS, Commissioner of Finance and Taxation of the State of Tennessee.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the Chancery Court of Davidson County (R. 142-152) is not reported. The original opinion of the Supreme Court of Tennessee (R. 161-172), and the opinion of the same court on petition to rehear (R. 196-198) are unofficially reported in ... S. W. (2nd) ..., and will be reported officially in ... Tenn. ....

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED.

Whether Tennessee can impose upon petitioner, a Tennessee corporation engaged in the business of leasing trucks within Tennessee to another Tennessee corporation, which uses said trucks in the course of its business of transporting agricultural produce within and without Tennessee, its sales tax based upon the privilege of selling, leasing or renting tangible personal property in Tennessee, and measured by the gross proceeds derived from such business.

STATUTE INVOLVED.

The only statute involved in this case is the sales and use tax law of Tennessee, Sections 67-3001-67-3048, T. C. A.

STATEMENT.

This litigation concerns the application of the Tennessee sales tax statute to petitioner for the period from November 21, 1949, to December 1, 1955 (R. 143). Petitioner is a Tennessee corporation with offices in Nashville, whose sole business during the period in question consisted of the leasing of its trucks to the Central Produce Company, likewise a Tennessee corporation with offices in Nashville (R. 42-43, 116, 124). The latter concern is engaged in the business of buying and reselling at wholesale farm and orchard produce (R. 43, 109).

Petitioner's lease of the vehicles in question to Central Produce Company was pursuant to a written lease contract entered into on April 8, 1940 (R. 17-19). Said contract

provided for the lease by petitioner to Central Produce Company of a number of large trucks and a number of small trucks in consideration of payment monthly by the lessee of a flat sum per month for each vehicle plus a stated amount per mile each vehicle was operated by the lessee (R. 18). The lessor agreed by the lease to furnish gasoline and oil for the trucks, to keep them in a reasonable state of repair, and to replace worn out equipment when necessary (R. 18-19). The lessee agreed to use only experienced drivers and inspect each truck before allowing it to be used on any trip (R. 19). The lessee further agreed that the name of petitioner should appear on each truck, but also was accorded the right to place its own name thereon (R. 18).

In addition to the operating expenses required by the contract to be borne by the lessor, petitioner furnished food and lodging for the truck drivers, paid all tolls and weighing fees, and provided permits to operate (R. 117, 163). Petitioner also provided ice to cool the produce hauled while in transit, but was reimbursed therefor by the lessee (R. 163).

During the period in controversy, petitioner received in rentals with respect to the large trucks $483,659.69, and with respect to the small trucks $51,106.07, making a total of $534,765.76 (R. 143). After allowing a credit against the latter figure in the amount of $115,351.01, representing purchases of repair parts within Tennessee with respect to which petitioner had already paid the Tennessee sales tax, respondent assessed and collected under protest from petitioner the sum of $12,967.66 in sales taxes, penalties and interest based upon its rentals from the lease of the trucks (R. 143-144, 39).

During the period in controversy, petitioner's large trucks, which were employed by the lessee in lessee's

long-haul operations, traveled 1,968,485 miles outside Tennessee and 41,212 miles within Tennessee, while the small trucks, used for local delivery, operated entirely within Tennessee (R. 139, 118).

The Supreme Court of Tennessee held, affirming the decision of the Chancery Court, Part I, of Davidson County in all respects, that the Tennessee sales tax was validly imposed upon petitioner for the exercise of the privilege of leasing or renting tangible personal property in Tennessee, and that petitioner was not entitled to recover the amount paid under protest (R. 161, 172, 196-198).

ARGUMENT.

The question presented in this case is narrow, and upon the basis of previous clear-cut decisions of this Court, it does not merit review by certiorari.

Stated basically, it is whether the concededly exclusive power of Congress to regulate interstate commerce precludes a state from imposing upon one of its own citizens a tax for the privilege of leasing property to another Tennessee citizen, who is free to employ such property at all times in whatever place and manner it may choose.

Petitioner's case in the state courts and in this court is bottomed on the premise that, in leasing vehicles to a lessee which employed some of them in interstate commerce, and in performing contractual and extra-contractual functions with respect to their maintenance and operation, petitioner itself became entitled to the constitutional immunities of an interstate commerce instrumentality with respect to the amounts derived by it from such lease. In support of its argument, it assumes that the lessee's operations are such that it would be entitled to complete immunity from sales or use taxation by Tennessee, and reasons that, since the lessor is required by Sections 67-3018-67-3020, T. C. A., to pass sales taxes on to its customer insofar as practicable, the state law necessarily by implication confers immunity upon the lessor as well.

Under the decisions of this court, it will look in testing state statutes to the construction accorded them by the highest court of the state, and accept that construction as binding unless it is patently given for an unconstitutional purpose. **Aero Mayflower Transit Co. v. Board of R. R. Com'rs,** 332 U. S. 495, 499f, 92 L. Ed. 99, 105. The highest court of Tennessee soon after the enactment of the sales tax statute held that the tax was a vendor tax (**Hooten v. Carson,** 186 Tenn. 282, 209 S. W. [2nd] 273), and it repeatedly recognized and adhered to this principle in ensuing

cases where it was pertinent. **Carbide & Carbon Chem. Corp. v. Carson,** 192 Tenn. 150, 239 S. W. (2nd) 27; **Broadacre Dairies v. Evans,** 193 Tenn. 441, 246 S. W. (2nd) 78; **Smoky Mountain Canteen Co. v. Kizer,** 193 Tenn. 598, 247 S. W. (2nd) 69. The opinion of the Tennessee Supreme Court in the instant case but reiterates it (R. 164).

The construction accorded Tennessee's sales tax statute by its highest court should be accepted as determinative of the question of the incidence of the tax, whereupon it will follow that no substantial federal question is presented by the petition.

I.

The Decision Below Is Clearly Correct.

Tennessee of course concedes that no state can impose upon interstate commerce a tax levy which has the effect of unduly burdening, restraining or regulating that commerce. Clearly, however, under the previous decisions of this court, a state tax upon the exercise of a purely local privilege has no such effect and does not offend the commerce clause of the Constitution.

Respondent relies here, as it did in the state courts, upon the opinions of this court in the cases of **McGoldrick v. Berwind-White Coal Mining Co.**, 309 U. S. 33, 84 L. Ed. 565, and **International Harvester Co. v. Indiana Dept. of Treasury**, 322 U. S. 340, 88 L. Ed. 1313. In the latter case, this court was called upon to consider the application of the Indiana gross income tax to what was known as:

> "Class D: Sales by branches located in Indiana to dealers and users residing outside of Indiana, in which the customers came to Indiana and accepted delivery to themselves in this state."

In sustaining the tax as to such sales, it was said (322 U. S. at p. 345f, 88 L. Ed. at p. 1317):

> "The Class D sales are sales by an Indiana seller of Indiana goods to an out-of-state buyer who comes

to Indiana, takes delivery there and transports the goods to another state. The Wood Preserving Corp. Case indicates that it is immaterial to the present issue that the goods are to be transported out of Indiana immediately on delivery. Moreover, **both the agreement to sell and the delivery took place in Indiana. These events would be adequate to sustain a sales tax by Indiana.** In McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33, 84 L. ed. 565, 60 S. Ct. 388, 128 A. L. R. 876, we had before us a question of the constitutionality of a New York City sales tax as applied to purchases from out-of-state sellers. The tax was 'laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price.' Id. 309 U. S., p. 43, 84 L. ed. 568, 60 S. Ct. 388, 128 A. L. R. 876. And it was 'conditioned upon events occurring' within New York, i. e., the 'transfer of title or possession of the purchased property.' Id., pp. 43, 44. Under the principle of that case, a buyer who accepted delivery in New York would not be exempt from the sales tax because he came from without the State and intended to return to his home with the goods. The present tax, to be sure, is on the seller. But in each **a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce.** In neither does the tax **aim at or discriminate against interstate commerce.** The operation of the tax and its effect on interstate commerce seem no more severe in the one case than in the other. Indeed, if we are to remain concerned with the practical operation of these state taxes rather than with their descriptive labels (Nelson v. Sears, R. & Co., 312 U. S. 359, 363, 85 L. ed. 888, 891, 61 S. Ct. 586, 132 A. L. R. 475), we must acknowledge that **the sales tax sustained in the Berwind-White Case 'was, in form, imposed upon the gross receipts from an inter-**

state sale.' Lockhart, Gross Receipts Taxes on Inte state Transportation and Communication, 57 Harvar L. Rev. 40, 87. But that case did no more than t hold that those in interstate trade could not complai if interstate commerce carried its share of the burden of local government which helped sustain it. An there was no showing that more than that was bein exacted." (Emphasis supplied.)

What is the situation in the instant case? A Tennesse lessor (seller) enters into a contract of lease, in Tennesse (R. 19), with a Tennessee lessee (buyer), to furnis vehicles which may be used whenever and wherever th lessee (buyer) chooses, with possession of the vehicle being turned over in Tennessee (R. 131) and the co sideration inferably being paid in Tennessee. Tennesse imposes its sales tax with respect to leases or rentals upo the lessor (seller) for the exercise of a defined privileg namely the leasing (selling) of tangible personal propert within her borders. Not only the leasing, but every e sential aspect of the transaction, was local in characte Extra-state or interstate use of the leased property by th lessee comprised no part of the contract. Time, place an manner of use was neither prescribed nor circumscribe in the contract, and the rights and obligations of the re spective parties stood in no wise to be enlarged or dimi ished according to the situs or mode of the lessee's use.

The taxable event in the instant case, the act of leasing was separate and distinct from commerce between th states, or with foreign countries, no less than in the **Inte national Harvester** case. In fact, the "Class D sales" i that case had considerably more of an interstate com plexion than did petitioner's lease in the case at bar, fo there the buyer was a non-resident of Indiana who trans ported the goods outside the state immediately on de livery, whereas here both parties were and continued to b Tennessee residents. If the Indiana levy did not burde

commerce, it is difficult to perceive how Tennessee's taxation of petitioner can do so.

There is positively no discrimination against interstate commerce in the case at bar. Petitioner is subjected to the same tax, on the same basis, and at the same rate and measure as anyone else leasing tangible personalty to others for a consideration. The fact that petitioner's lessee operates interstate or outside Tennessee does not serve to broaden petitioner's statutory liability for the tax one iota, or deprive it of any immunity or advantage which it would otherwise enjoy. Interstate commerce is placed at no competitive disadvantage as against intrastate business of the same character.

The tax is not one susceptible of duplication by other states. Only Tennessee possesses the requisite jurisdiction to tax a transaction, in this case the act of leasing, consummated wholly within her borders. Indeed, if Tennessee is precluded from taxing petitioner for the privilege of leasing trucks within Tennessee to a lessee who is free to use them as it pleases, then petitioner will go scot-free, to the manifest unjust competitive disadvantage of others who lease trucks within Tennessee, and within other states having sales taxes, to lessees who are unfettered as to place and manner of use.

It follows therefore, that the Tennessee sales tax was validly imposed upon petitioner, and that the action of the Tennessee courts in sustaining it was clearly correct.

II.

There Is No Important Question of Federal Law.

Petitioner seeks to invoke the commerce clause by its insistence that it, in leasing vehicles to one engaged in buying, selling and transporting merchandise across state lines for the lessee's own account, and by maintaining

such vehicles, becomes itself an interstate instrumentality beyond the pale of state taxation. This contention finds refutation in a case decided by this Court in 1932, **Eastern Air Transport, Inc., v. South Carolina Tax Comm.**, 285 U. S. 147, 76 L. ed. 673, wherein immunity under the commerce clause was asserted by an interstate airline concern with respect to gasoline purchased for its airplanes from South Carolina dealers. Said this Court, after noting that the tax was an excise tax upon the dealer for the privilege of carrying on the business of selling gasoline within the state:

> "'• • • Undoubtedly, purchases of goods within a State may form part of transactions in interstate commerce and hence be entitled to enjoy a corresponding immunity. But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a nondiscriminatory tax imposed by the State upon intrastate dealers. There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected'" (285 U. S. 152f, 76 L. ed. 675).

The cases relied upon by petitioner hold correctly that a state may not lay a tax upon the gross receipts derived from interstate commerce; or any local incident thereof, so closely related to the commerce as to be a part thereof. What is involved in the case at bar however is not a gross

receipts tax, but a sales tax; nor is it laid upon interstate commerce itself, but upon the purely local activity of leasing property to one who may employ it in interstate commerce or not as it may choose. Such activity is not so identified with the commerce carried on by the lessee as to make it immune from non-discriminatory taxation, and this Court so held in so many words in **Eastern Air Transport v. South Carolina Tax Comm.**, supra.

Petitioner suggests that other states might exact with respect to its vehicles a use tax based upon the use value consumed therein. The record is, however, devoid of anything which would indicate that any such tax has been so exacted, paid or sought to be exacted. Respondent does not understand that such a tax would be constitutionally permissible, inasmuch as a tax upon use consisting entirely of use in the course of interstate commerce would probably amount to a burden on that commerce. **Helson & Randolph v. Kentucky**, 279 U. S. 245, 73 L. Ed. 683.

To invoke the immunity from state taxation afforded by the commerce clause of the Constitution, one must show that he is engaged in interstate commerce, or some integral part thereof, with respect to the subject sought to be taxed. This petitioner has not done and cannot do, because petitioner's business is localized in Tennessee and has no interstate aspect other than the fact that its lessee independently engages in commerce as it chooses, and freely employs the vehicles leased from petitioner in that commerce. The lease of vehicles by petitioner to a business operating across state lines is no different in principle from a sale to petitioner of supplies and parts for the vehicles, the Tennessee sales tax with respect to which petitioner always paid without question (R. 105-106). Yet if petitioner is, as it contends, engaging in interstate commerce by leasing trucks to one who uses them in such commerce, its purchases for those trucks should also enjoy immunity. Such would not be the law, however, for this Court has never

extended the protection of the commerce clause to sellers with respect to purely local sales, though sales taxation of such sales by the states indisputably adds to the ultimate cost to the purchaser doing a business which may be entirely interstate.

It is therefore clear that Tennessee's sales tax being a vendor tax, and having been consistently so held by its highest court, and having been applied to petitioner on account of entirely local activities which bring petitioner squarely within its terms, and not in contravention of the commerce clause of the Constitution under previous decisions of this Court, no federal question warranting review by certiorari is presented by the petition herein.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be dismissed.

Respectfully submitted,

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I hereby certify that I have delivered on the ..... day of ....., 1957, to Mr. Eugene D. Jackson, Sr., American Trust Building, Nashville, Tennessee, counsel for the petitioner herein, two copies of this response.

Milton P. Rice,
Assistant Attorney General